United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-7306

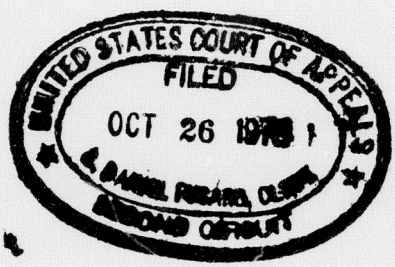
PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-against-

BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellants-Cross-Appellees.



B/S

PETITION OF MUNICIPAL APPELLANTS FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC AND APPENDIX

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-
Appellants,
Municipal Building,
New York, N.Y. 10007.
566-3322 or 2192

LEONARD KOERNER,
JOSEPH BRUNO,
ROSEMARY CARROLL,
of Counsel.

TABLE OF CONTENTS

Page

History of the Case..... 2

Grounds for Seeking Rehearing..... 6

Conclusion..... 12

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAMELA SCHNEIDER, PATRICIA WHIT[illegible], MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-against-

BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellants-Cross-Appellees.

PETITION OF MUNICIPAL APPELLANTS FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Appellants present this petition for rehearing of the decision of August 20, 1976, which modified this Court's prior judgment of July 22, 1976 and also modified the judgment of the District Court of July 1, 1976 and remanded the matter to the District Court for fair hearings by the appropriate State agency in accordance with the pertinent Federal and State regulations.

On September 2, 1976, appellants, prior to the issuance of a mandate, moved pursuant to Rule 40 of the Federal Rules of Appellate Procedure to enlarge the time to file a petition for rehearing with a suggestion for a rehearing en banc and for an order staying the issuance of the mandate.

On September 22, 1976 this Court issued a mandate and on September 23, 1976 the state hearing officer began the "fair hearings". (APPENDIX B) These hearings have continued on separate dates and are presently adjourned sine die.

On October 18, 1976, this Court extended appellants time to file a petition for a rehearing to October 26, 1976 (APPENDIX C).

Rehearing is sought pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure on the ground that the issue decided in appellee's favor entitling them to immediate relief was raised by the appellees, on an expedited appeal, in their cross-appeal, and the appellants were not given an opportunity to brief the issue.

History of the Case

Due to to fiscal crisis in the City of New York affecting all levels of government, the program budget for the Agency for Child Development (ACD) was reduced to $157 million in mid 1975-76 fiscal year. As a result of this cut, twenty eight (28) day care

centers were closed due to budgetary cuts on or about January, 1976.

Pursuant to Title XX of the Social Security Act, (42 U.S.C. 1397 et seq.), the Federal Government will reimburse 75% of the expenditures of the City of New York for all Title XX Programs which may or may not include day care services up to a maximum of $150 million. New York State reimburses 12 1/2% of these Title XX Program expenditures. Prior to and in the midst of the current fiscal crisis, New York City is expending in excess of the $150 million reimbursement ceiling established by the Federal Government for Title XX programs. The budget cuts which are the subject of this suit are an effort to bring New York City's Title XX Program expenses within the reimbursement ceiling and thereby permit the City to take advantage of maximum federal reimbursement.

Prior to June 1, 1976 and after evaluating all available alternatives, ACD concluded that the best way to comply with the fiscal constraints imposed upon it by state and city officials was to totally defund forty nine (49) day care programs and seven (7) mini-family care programs and partially defund fifteen (15) day care centers effective July 1, 1976.

Conferences were held between ACD and sponsoring boards of the centers explaining the reasons for the defunding and criteria utilized in making the

specific determinations.

At or about the same time as meetings with sponsoring boards were being held, notices of the proposed closings were sent to parents of children who were in attendance at centers scheduled for defunding. These notices, indicating the fiscal crisis as the reason for defunding, set forth alternate placements for the children affected by the defundings and asked the parent to indicate acceptance or declination of the alternative placement.

By August 31, 1976, all children previously in attendance at defunded programs were offered alternative day care placement.

Among other claims, plaintiffs in the First, Second and Third Counts of the complaint argued that the defundings of the subject day care centers represent a denial, reduction and termination of day care services to the parents of the children in attendance and that the failure to afford plaintiffs a "fair hearing" as described in state and federal regulations violates state and federal law as well as the Due Process Clause of the United States Constitution.

On June 21, 1976 plaintiffs, by Order to Show Cause, applied for a preliminary injunction in the United States District Court, Southern District of New York to halt the June 30, 1976 scheduled complete or partial defundings of the subject day care centers until such time as each parent involved was

permitted to seek and obtain a "fair hearing" as prescribed in certain federal and state statutes and regulations and by the United States Constitution.

On July 1, 1976, Judge Cannella enjoined the defunding of the centers until group hearings were held. The appellants filed a notice of appeal immediately and an expedited argument of the appeal was scheduled for July 20, 1976. Appellees filed a notice of cross-appeal on July 14, 1976. Appellants were never served with the notice of cross-appeal and did not become aware of the cross-appeal until July 19, 1976. At oral argument, the next day, the appellants' counsel informed the Court that the City defendants had not become aware of the cross-appeal on the statutory fair hearing issue and would require additional time to submit a brief. The appellees urged that if additional time was granted, the injunction should continue pending the Court's decision of the appeal. Counsel for appellants then informed the Court that the City defendants preferred an immediate decision. An order vacating the preliminary injunction was issued the following day. The order noted that an opinion would follow. One month later the opinion was issued which modified the order of July 21, 1976 (APPENDIX A). That opinion upheld the cross-appeal to the extent that plaintiffs were entitled to fair hearings under the federal regulations.

In its opinion the Court found that the interests of parents in the maintenance of day care centers as provided by the Federal and State statutes and regulations fall within the ambit of due process requirements. If the hearing officer finds that the administrative action involves a change of law or policy, the aid can be discontinued and the individuals aggrieved thereby may pursue a post-termination hearing.

Grounds For Seeking A Rehearing

The decision of the Court of Appeals places upon the state hearing officer the responsibility for determining the propriety of a general budgetary reduction of total day care services in the City of New York.

This Court found a violation of CFR 205.10, which section requires a fair hearing before assistance shall be suspended, reduced, discontinued or terminated. With respect to the instant case, the Court determined that the administrative decision as to the necessity for defunding must be examined, in the first instance, at a fair hearing. (Opinion, p. 14) At such hearing, the hearing officer determines whether such defunding constitutes an issue of federal or state policy, or a change in state or New York law.

The decision of this Court rested solely upon 45 CFR 205.10(a)(6)(A) which permits defunding while a hearing is conducted, if a determination is made at the hearing that the "sole issue is one of State or

Federal law or policy***" not one of incorrect grant application.

The Court's application of CPR 205.10 to the facts of the instant case is error.

The program budget for day care services in the City of New York in July 1975 was approximately $165 million. Due to the fiscal crisis affecting all levels of government in the City of New York, the budget for the 1975-76 fiscal year was reduced to $157 million and further reduced for fiscal year 1976-77 to reflect a 16% deficit between present cost and available funds. As a consequence, the number of centers was reduced by 49. In this proceeding it was undisputed that the fiscal crisis required a reduction in the total provision of day care services. The administrative decision only concerned which centers should be defunded. In making that decision, the ACD conducted an exhaustive study of day care centers utilizing city funding. It determined, after reviewing and considering the cost effectiveness, availability of alternate placements and the total funding practice for day care in this city, that forty nine day care centers and other programs would have to be defunded in order to live within the finite limits of day care funding available to the city and the ACD.

ACD has not challenged, by this defunding, the eligibility of any child or family for day care services. Since day care assistance, unlike public

welfare assistance, is a closed ended program with a limited source of funds and limited availability of placements, waiting lists for placement exist on a daily basis. This Court in its opinion recognized the apparent difference between the urgency and necessity for welfare benefits (Goldberg v. Kelly, 297 U.S. 254 (1970)), and the needs and demands for day care services, the latter is not a necessity for life itself. (Opinion p. 12).

With the understanding that not every applicant for day care placement has a right to immediate placement and with the understanding that the eligibility for day care is not at issue for any plaintiff child or family affected by the defundings, the fair hearing officer of the state agency will have no appropriate function to perform in the "fair hearings" ordered by this Court. It is not an appropriate function of the fair hearing officer to consider the propriety of ACD's selection of the particular day care program defunded. This is the responsibility of ACD, subject to review in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules for arbitrariness, illegality or abuse of discretion.

In a "fair hearing" granted to a day care recipient or applicant, the only logical issues for that state officer to determine must go to factors affecting the person's eligibility for day care. The issue of "change in State law or policy" must be limited to

changes affecting eligibility of certain persons or groups of persons for day care. To order a "fair hearing" under 45 CFR 205.10 in the case at bar, is to mandate a process without a remedy. Illustration of this point is the following example. If ACD must cut its budget and defundings are the method it chooses, the "fair hearing" officer as charged by this Court could determine, for a variety of reasons, that the centers selected should not be defunded. This decision would simply mean that other centers would take the place of the prior defunded centers. The children in attendance at those centers would now come to the state agency for a "fair hearing" to contest the defundings. In short, the same number of centers will ultimately be defunded. Children will ultimately be displaced from service and some will go on waiting lists along with others previously there. The cycle is endless and the "fair hearing" cannot accomplish that which plaintiffs seek, i.e., an end to the defundings. It is only logical that the "fair hearing" could not be intended to examine the issues presented in the case at bar. Issues of individual eligibility should be examined by this process, but defundings due to fiscal crisis where a decision of the "fair hearing" officer in favor of plaintiffs will only shift the defundings to other centers is not and cannot be the purpose of the 45 CFR 205.10 hearings.

The hearings ordered by this Court, which are presently in progress, but adjourned sine die pending this Court's decision on city defendants' request for rehearing, are costly and elongated proceedings. They cause a severe impediment to the administrative decision making process at ACD, a process which must be prepared to move on an expedited basis during a fiscal crisis. The ACD, under this Court's order, must delay defunding until it has participated in "fair hearings" for hundreds or thousands of persons despite the fact that the ultimate result can only be to shift the defunding to other programs. The "limited pot" of funds available to ACD for day care programs mandates that result. The "endless cycle" caused by this Court's interpretation that hearings under 45 CFR 205.10 are applicable to defundings caused by fiscal crisis defies logic and makes this Court's opinion error on this issue.

As stated previously, the individual and the center affected by defunding are not without a remedy. The selection of the centers affected as well as the criteria utilized to make the decision are all subject to review in state court under Article 78 of the CPLR.

The hearings mandated under 45 CFR 205.10 are required where welfare payments are involved. Public assistance is a life service and an open-ended program where reductions for any reason should be considered prior to termination. In day care where we are not

dealing with a life source program and we are dealing with a closed ended, limited program, the only issue for which 45 CFR 205.10 could be intended is for cause reductions, suspensions or terminations on an individual basis. Fiscal crisis reductions, where the eligibility of anyone affected is not at issue, does not fall within the logical ambit of the "fair hearing."

The decision of this Court establishes a bad precedent for the future. The fiscal crisis in the City of New York is not at an end. Further cutbacks in the day care program may well occur. The precedent of this Court's order will hinder the capacity of ACD to react to the developments of the fiscal crisis and the need for reduced spending.

The City defendants do not stand alone in their appraisal of the purpose and scope of the "fair hearings" mandated by 45 CFR 205.10. The State defendants, who are charged with the responsibility of overseeing the city's day care program and in conducting the "fair hearings", agree with the City defendants in urging that the hearings ordered by this Court are inappropriate to deal with the issues raised in this case and the Court erred in requiring such hearing to be held.

CONCLUSION

THE PANEL'S DECISION RAISES FUNDAMENTAL QUESTIONS CONCERNING THE SCOPE OF FAIR HEARINGS. IT IS RESPECTFULLY SUBMITTED THAT, FOR THE REASONS STATED HEREIN, THIS COURT SHOULD RECONSIDER ITS DECISION AND THE CASE SHOULD BE SET FOR REHEARING EN BANC.

October 26, 1976.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Municipal
Appellants.

LEONARD KOERNER,
JOSEPH D. BRUNO,
ROSEMARY CARROLL,
of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1372—September Term, 1975.

(Argued July 20, 1976 Decided August 20, 1976.)

Docket No. 76-7306

PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

—against—

BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellants-Cross-Appellees.

Before:

MESKILL and WATERMAN, *Circuit Judges,* and BARTELS, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York (John M.

* Of the Eastern District of New York, sitting by designation.

EXHIBIT "A"

Cannella, *J.*) dated July 1, 1976, granting a preliminary injunction against the municipal defendants enjoining defunding by New York City of 49 day care centers and partial defunding of a number of others, and requiring the municipal defendants to conduct certain hearings prior to the defundings.

Modified and remanded.

LEWIS R. FRIEDMAN, New York, N.Y. (Pollack & Kaminsky, New York, N.Y., Richard M. Asche and Martin I. Kaminsky, of counsel; Litman, Friedman & Kaufman, New York, N.Y., Jack T. Litman, of counsel), *for Plaintiffs-Appellees-Cross-Appellants.*

ROSEMARY CARROLL, New York, N.Y. (W. Bernard Richland, Corporation Counsel, Leonard Koerner and Joseph F. Bruno, of counsel), *for Municipal-Defendants-Appellants.*

MARK C. RUTZICK, New York, N.Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Irving Galt, of counsel), *for Defendant-Appellant Philip Toia.*

BARTELS, *District Judge:*

Plaintiffs, whose children attend day care centers funded under Title XX of the Social Security Act (42 U.S.C. §§1397 *et seq.*), pursuant to the New York State plan, N.Y. Social Services Law §4103(a) (McKinney 1972), appeal on behalf of themselves and their minor children and all others similarly situated from an order of the United States District Court for the Southern District of New

York (Cannella, *J.*) granting plaintiffs' application for class certification and for a preliminary injunction. The order enjoined the defendants from defunding 49 day care centers funded by New York City and also from the partial defunding of 15 other day care centers prior to holding a group hearing or a series of group hearings to be attended by parents of children attending the defunded day care programs. Defendants appeal from the granting of the injunction. Plaintiffs cross-appeal from the decision below to the extent that the hearing ordered by the district court was not required to be a "fair hearing" allegedly mandated by federal and state regulations and they seek at the same time a modification of the said order to require such "fair hearings." Jurisdiction is predicated upon 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §1331.

I

Although the facts are set forth in the opinion of the district court, a brief summary of the statutory framework is necessary. Day care services in New York City are not mandated but are funded under Title XX of the Social Security Act (42 U.S.C. §§1397 *et seq.*), pursuant to which the federal government participates in up to 75% of the expenditures for day care services provided by the state to eligible parents subject to a $150 million ceiling. New York State contributes 12.5% of the cost and New York City contributes the remaining 12.5%. Day care services are administered by the Agency for Child Development of the City of New York ("ACD"), which is a division of the Human Resources Administration ("HRA") of the City of New York, and these services are rendered at day care centers which are non-profit corporations which are reimbursed for their expenses by ACD on the basis of an

annual budget. Because of the $150 million ceiling federal funds do not cover 75% of all day care services and in many instances the City has been providing those services without reimbursement from either federal or state funds. It is admitted that ACD, the City and the State are in a "financial crunch" and that ACD's limited funding requires at least a redistribution of funds. In response to this fiscal crisis ACD was required to reduce its budget by $30.8 million or 16%.

After considering various alternative methods ACD determined that the best method of accomplishing this reduction was to defund 49 day care programs and 7 mini-family care programs and partially defund 15 day care centers, resulting in the closing of centers providing services for more than 3,000 children. Accordingly, on June 1, 1976, ACD sent a written notice of intended closings to each day care center scheduled for defunding. Prior to July 1, 1976, meetings were held with ACD staff and sponsoring boards of defunded programs requesting a conference, at which ACD explained the reason and the criteria for the closings. While the record to date is unclear ACD projects that by the end of August, 1976, all the affected children will have been placed in alternative centers. In addition ACD has pledged that in making the new placements it will "accord geographic considerations the highest priority."[1] It further estimates that between 75% and 85% of the children affected will be offered placement in centers within 15 to 20 blocks of their present center.[2] Although 1,000 parents made a written demand for a hearing pursuant to 18 N.Y.C.R.R. pt. 358, no such hearing has been granted.

---

1 Affidavit of Stephen Tamke, Assistant Interim Executive Director of ACD, p. 7 (June 25, 1976).

2 Affidavit of James Nathaniel, Director of ACD Field Operations, p. 1 (June 28, 1976).

Upon this state of facts plaintiffs moved for a preliminary injunction enjoining the defendants from defunding the centers until (1) such time as the parents receive a "fair hearing" as described in state and federal regulations; (2) all persons in the same geographic areas and category receive similar day care services; and (3) the defendants give public notice of amending their state plan.

In its opinion below, the court noted that 45 C.F.R. § 205.10(a)(6)(A) permits defunding while a hearing is conducted if a determination is made at the hearing that the "sole issue is one of State or Federal law or policy . . . and not one of incorrect grant computation." Concluding that in this case the question of defunding in response to the fiscal budget crisis was such a policy determination, the district court held that compliance with the federal regulations would "not be dispositive of plaintiffs' claim for relief" and proceeded to consider the constitutional claim raised. In referring to New York State's participation in the federal program (42 U.S.C. §1397a) pursuant to New York State Social Services Law §410-b and the creation of ACD by the City of New York, the court concluded, however, that the plaintiffs "acquired a specific and legitimate expectation that they will be able to send their children to a day care center" which as a matter of statutory entitlement fell within the due process requirements of *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970). *See also Goss* v. *Lopez*, 419 U.S. 565, 572-74 (1975); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Caramico* v. *Secretary of H.U.D.*, 509 F.2d 694 (2d Cir. 1974); *Burr* v. *New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2d Cir. 1973). Thereupon the court on July 1, 1976, certified the class action and enjoined the defunding of the day care programs prior to a group hearing or a series of group hearings upon five days' notice, affording parents an opportunity to present their views, without requiring ACD

to present any evidence and at the same time ordering service upon the plaintiffs of its written decision articulating the facts underlying and the reasons for its decision. Accordingly, ACD had intensive hearings at which plaintiffs aired their grievances and protests and made suggestions, and at which ACD gave its reasons for rejecting the suggestions and explained its criteria for defunding. After the "Decision Pursuant to Group Hearings" was filed by ACD, the district court decided in a memorandum-decision dated July 21, 1976, that the group hearings complied with the court's order of July 1, 1976 and declined to further stay the defunding of the day care centers. This Court affirmed with opinion to follow.

Since the preliminary injunction has been dissolved, the defendants' appeal has become moot. What remains, however, is plaintiffs' cross-appeal. They claim the procedure employed in defunding the day care centers denies them due process and violates the Social Security Act and regulations of the United States Department of Health, Education and Welfare ("HEW") insofar as they were denied a "fair hearing" before termination or reduction of benefits.

II

From the admitted facts, no serious question can be raised that a substantial constitutional claim has been asserted and, in addition, that the statutory claim is predicated upon the common nucleus of operative law and fact required by *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966). The district court properly held that the statutory claim was pendent, and further that both claims present common questions of law and fact, and that the plaintiffs could fairly and adequately represent those claims, thus authorizing certification of the class suit. The district court at the threshold considered the pendent claims, but decided that they were not "dispositive" and

necessitated a consideration of the constitutional issue. We cannot agree with this conclusion, and believe a fuller consideration of the pendent statutory claim first would have rendered it unnecessary for the court to have reached the constitutional issue. *Hagans* v. *Lavine*, 415 U.S. 528, 94 S.Ct. 1372 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 90 S.Ct. 1207 (1970); *Wyman* v. *Rothstein*, 398 U.S. 275, 90 S.Ct. 1582 (1970); *Almenares* v. *Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944, 92 S.Ct. 962 (1972).

Considering then, as we must, the statutory claim first, we note that HEW has promulgated regulations as authorized by the Social Security Act, 42 U.S.C. §1302 (1969) expressly requiring a state plan to provide a hearing which would meet the *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), due process standards and also the standards set forth in 45 C.F.R. §205.10.[3] Sections 205.10(a)(4), (a)(9), and (a)(13) specifically provide, among other things, that in cases of intended action to discontinue, terminate, suspend, or reduce assistance, the state agency is required to give adequate notice, to provide for a hearing conducted by an impartial official or designee of the agency, to afford the claimant an opportunity to examine the contents of the case file and documents before the agency prior to the hearing, to permit the claimant to (i) present his case himself or with the aid of an authorized representative, (ii) bring witnesses, (iii) establish facts, (iv) advance arguments, (v) confront and cross-examine adverse witnesses, and to notify the claimant of the decision in writing. The same regulations expressly provide for a single group hearing by a consolidation of individual requests where the sole issue involves state or federal law, or policy or changes therein.

3 45 C.F.R. §228.14 makes applicable to the recipients of day care services the requirements of 45 C.F.R. §205.10.

Section 205.10(a)(5)(iv) reads as follows:

"Agencies may respond to a series of individual requests for hearing by conducting a single group hearing. Agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law. In all group hearings, the policies governing hearings must be followed. Thus, each individual claimant shall be permitted to present his own case or be represented by his authorized representative;"

Sections 205.10(a)(6)(i) and (a)(6)(i)(A) reads as follows:

"If the recipient requests a hearing within a timely notice period:

(i) Assistance shall not be suspended, reduced, discontinued or terminated, (but is subject to recovery by the agency if its action is sustained), *until a decision is rendered after a hearing, unless:*

(A) A determination is made *at the hearing* that the sole issue is one of State or Federal law or policy, or change in State or Federal law and not one of incorrect grant computation." [emphasis added].

From the above it is manifest that the determination of what is "State or Federal law or policy, or change in State or Federal law" is to be made in the first instance at least "at the hearing" and not in a court proceeding, and it is equally manifest that once that determination is made "at the hearing," assistance may be suspended, discontinued or terminated until a final decision "is rendered after a hearing."

The New York State Department of Social Services has adopted similar although not identical regulatory provi-

sions for a "fair hearing" in 18 N.Y.C.R.R. pt. 358. In §358.8 the regulation states that assistance shall be continued until a decision is rendered "except in a case in which the Department has determined in accordance with federal requirements that the issue is one of state policy . . . ."

There is no ambiguity in the wording of this regulation, which makes it crystal clear that it is the department, not the court, that makes the determination in the first instance before any cessation or interference with the continuation of the assistance. We do not agree that compliance with the regulation would not dispose of the issue. In this case the plaintiffs have properly demanded from the agency the required hearing, but the state agency has ignored the request. Had it complied, the necessity for further action by the agency might well have been eliminated by this time. Instead, the agency has furnished affidavits relying upon and emphasizing the budgetary crisis and the fiscal restraints imposed upon the agency by the Mayor of New York and the Emergency Financial Control board. The affidavits reveal an exhaustive study in cost analysis made by the agency before making its decision to defund these particular day care centers. It further maintains that it is providing alternative placements for all children affected by the defunded centers.

The agency also argues that a recipient of day care services does not have a right to receive services at a particular facility, and that a hearing is only required where a decision must be made in individual cases to determine the eligibility of a recipient for day care services. It claims that there is no issue of fact to be determined at a hearing as to the status of any individual, but that the issue is simply a matter of policy as to where necessary emergency cuts may best be made, the

determination of which requires no hearing. It argues in effect that there is no reduction or termination of services involved by defunding. Unfortunately, the issue is not that simple, since conceivably defunding under certain circumstances might be equated with a reduction or discontinuance of services. It is unnecessary for this Court at this time to resolve this issue or the corollary issue as to whether a recipient of day care services has a statutory or constitutional right to receive services at a specific day care center or location. *Cf. Windham* v. *City of New York*, 405 F.Supp. 872 (S.D.N.Y. 1976); *Gasaway* v. *McMurray*, 356 F.Supp. 1194 (S.D.N.Y. 1973). These are questions which in the final analysis can best be determined by a hearing under the regulations. Unlike the pre-termination hearing in *Goldberg, supra*, however, assistance in this case may be suspended, reduced or terminated until a decision is reached if the sole issue involved is one of policy or change in State or Federal law.

III

As noted above, the federal hearing requirements in 45 C.F.R. §205.10(a) are modeled principally on the due process mandates of *Goldberg, supra*, which dealt with the termination before a "fair hearing" of welfare benefits constituting the "basic demands of subsistence." The *Goldberg* Court also recognized that some governmental benefits may be administratively terminated before an evidentiary hearing. *See, e.g., Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974); *Torres* v. *New York State Department of Labor*, 333 F.Supp. 341 (S.D.N.Y. 1971), *petition for rehearing denied*, 410 U.S. 971, S.Ct. 1446 (1973). Under the flexible concept of due process, what procedures may be due under a given set of circumstances depend upon the extent to which the recipient of govern-

mental benefits may be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 647 (1951); *Cafeteria & Restaurant Workers, Local 437* v. *McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748-49 (1961); *Hanna* v. *Larche*, 363 U.S. 420, 440, 80 S.Ct. 1502, 1513, 1514 (1960).

In *Goldberg, supra,* the Court reasoned that persons qualified to receive welfare benefits necessary for survival possessed a statutory entitlement to these benefits which were more like "property" than a "gratuity." Both the federal and state administrative agencies have prescribed the same pre-termination fair hearing requirements for both welfare and day care services recipients. There is an apparent difference between the urgency and necessity of welfare benefits and the needs and demands for day care services which raise serious doubts whether the beneficiaries of day care center services can be placed in the same category as the recipients of welfare benefits in the context of due process requirements for pre-termination hearings. We recognize that there are protectable interests other than the traditional or conventional property interests which require some type of a due process hearing before termination of benefits, see *Caramico* v. *Secretary of H.U.D., supra,* and *Burr* v. *New Rochelle Municipal Housing Authority, supra,* but we can find no reason to conclude that the interests of parents in the maintenance of day care centers as provided by the Federal and State statutes and regulations fall within that due process category. *Bishop* v. *Wood*, —— U.S. ——, 96 S.Ct. 2074 (1976). *See, also,* Friendly, *"Some Kind of Hearing,"* 123 U.Pa. L.Rev. 1267 (1975). Nevertheless, the regulations provide for the same pre-termination hearings in both cases. While in the formulation of the regulations a question might have been raised whether the regulation incorporating the *Goldberg* due process rationale for termination of day care

services was rationally adopted by HEW, see *Federal Communications Commission* v. *WJR, the Goodwill Station,* 337 U.S. 265, 69 S.Ct. 1097 (1949), the regulation as it now stands must be sustained so long as it can be said that it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 280-81, 89 S.Ct. 518, 525 (1969); *Johnson's Professional Nursing Home* v. *Weinberger,* 490 F.2d 841 (5th Cir. 1974). No challenge is now presented to the validity of this regulation as far as it applies to a fair hearing involving day care center services and consequently there can be no question that the regulation remains in full force and must be given the same effect as the statutes themselves *Smith* v. *Vowell,* 379 F.Supp. 139 (W.D. Texas), *aff'd,* 504 F.2d 759 (5th Cir. 1974).

In the last analysis, however, it seemed to us that the real objection to the application of the "fair hearing" regulation to termination of services by day care centers is not so much to the evidentiary nature of the hearing as to the requirement, as in *Goldberg,* of a continuation of assistance payments before any hearing. In the context of this case we need not reach this issue since the Federal regulations specifically provide that assistance may be discontinued or terminated until "a decision is rendered after a hearing" if at the hearing it is determined that the "sole issue is one of State or Federal law or policy, or change in State or Federal law." The State regulation is substantially the same, permitting cessation of payments when "the issue is one of State policy" and "neither one of fact or judgment."

While we believe that hearings conforming to the procedural requirements set out in the regulations should be mandated forthwith, it appears to us as inescapable that it will be determined at the hearing that the necessity for defunding presents an issue which is solely one of "State

or Federal law or policy, or change in State or Federal law" which would justify an immediate suspension, reduction, discontinuance, or termination of assistance until a decision is rendered after the hearings. It should be noted, however, that this is a decision to be made by the hearing officer and not by the Court. It is well settled that a preliminary injunction is an extraordinary remedy and must not be granted except upon a clear showing that there is a likelihood of success and irreparable injury. *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 349 U.S. 999 (1969); *Sanders* v. *Air Line Pilots Ass'n Int'l*, 473 F.2d 244, 248 (2d Cir. 1972). There has been no showing by the plaintiffs of any likelihood of success on the merits and "the balance of hardships tips decidedly" toward the defendants. *See Checker Motors Corp.* v. *Chrysler Corp.*, *supra*, 405 F.2d at 323; *Gulf & Western Industries, Inc.* v. *Great A. & P. Tea Co., Inc.*, 476 F.2d 687, 692-99 (2d Cir. 1973); *San Filippo* v. *United Bro. of Carpenters & Joiners*, 525 F.2d 508 (2d Cir. 1975). Under these circumstances to require payment of assistance in the interim would ignore the realities of the hearing, impose unnecessary hardships upon the defendants and threaten the continuation of other day care centers. Consequently, we do not believe the injunctive relief sought in the cross-appeal should be granted before the hearings.

IV

In light of the foregoing, we modify our former judgment entered on July 22, 1976, and also modify the judgment of the district court and remand the case to that court with instructions to mandate an accelerated hearing[4] by

4 In a letter to this Court of July 21, 1976, the plaintiffs state that hearings can be held expeditiously and "the matter finally resolved within a week to ten days" and they further consent to immediate hearings this week and to group hearings which may be conducted

the state agency in accordance with the pertinent Federal and State regulations. After the determination of whether the sole issue is one of "State or Federal law or policy, or change in State or Federal law" the hearing officer should determine whether in fact there has been a discontinuance or reduction in payment assistance[5] and if so, whether such discontinuance or reduction has been justified by the budgetary crisis and fiscal restraints imposed upon the agency. For the reasons above stated we deny interim injunctive relief prior to that hearing.

---

simultaneously" and assert that the "review of documents will take one day at most." Letter from Lewis R. Friedman, Esq., to United States Court of Appeals for the Second Circuit, July 21, 1976.

5 We emphasize that our decision in this case does not stand for the proposition that agency budgetary reallocations *per se* are reductions of services. *See* discussion *supra* at p. 5240.

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of August one thousand nine hundred and seventy-six.

Present: HON. THOMAS J. MESKILL

HON. STERRY R. WATERMAN, C.JJ.

HON. JOHN R. BARTELS, D.J.

Circuit Judges,

Pamela Schneider, Patricia White, Marie Myrtil, Jane Roe and Lynn Ann Tyler, on behalf of themselves and their minor children and all others similarly situated, Plaintiffs-Appellees-Cross-Appellants, v. Betti S. Whaley, individually and as Commissioner of the Agency for Child Development of the City of New York; J. Henry Smith, individually and as Commissioner of the Human Resources Administration of the City of New York; and Phillip Toia, individually and as Commissioner of the Department of Social Services of the State of New York, Defendants-Appellants-Cross Appellees.	76-7306) 76-7331) 76-7335)

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

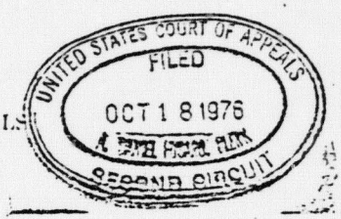
It is further ordered, adjudged and decreed that the motion for a stay be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

by: Vincent A Carlucci
Chief Deputy Clerk

Exhibit B

D-4
76-7306



UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Eighteenth day of October, one thousand nine hundred and seventy-six.

Pamela Schneider, Patricia White, Marie Myrtil, Jane Roe, and Lynn Ann Tyler, on behalf of themselves and their minor children and all others similarly situated,
Plaintiffs-Appellees-Cross-Appellants,
v.
Betti S. Whaley, individually and as Commissioner of the Agency for Child Development of the City of New York; J. Henry Smith, individually and as Commissioner of the Human Resources Administration of the City of New York, and Philip Toia, individually and as Commissioner of the Department of the State of New York,
Defendants-Appellants-Cross-Appellees.

It is hereby ordered that the motion made herein by counsel for the

appellants

by notice of motion dated September 2, 1976 to extend the time to file a petition for rehearing with suggestion for rehearing en banc to and including September 17, 1976.

be and it hereby is granted.

It is further ordered that the time for filing the petition be and it hereby is extended to and including October 26, 1976.

THOMAS J. MESKILL

Circuit Judges

Exhibit "C"

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stuart Barel .... being duly sworn, says that on the 26 day of Oct 1976, he served the 3 annexed Petition for mandamus relief upon Lettman, Freedman, Kaufman ... Esq., the attorney for the ... herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 120 B'way in the Borough of Man, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 26 day of Oct 1976

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1787
Commission Expires May 1, 1978

James Burns

Stuart Barel

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stuart Barel .... being duly sworn, says that on the 26 day of Oct 1976, he served the 3 annexed Petition for mandamus relief upon Mark C. Rutzick ... Esq., the attorney for the ... herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 2 World Trade Center in the Borough of Man, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 26 day of Oct 1976

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1787
Commission Expires May 1, 1978

James Burns

Stuart Barel

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stuart Barel .... being duly sworn, says that on the 26 day of Oct 1976, he served the 3 annexed Petition for mandamus relief upon Pollack & Kaminsky ... Esq., the attorney for the ... herein by depositing 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 61 B'way in the Borough of Man, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 26 day of Oct 1976

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1787
Commission Expires May 1, 1978

James Burns

Stuart Barel

Form 323-50M-...(75)